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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TONY R. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOSEFINA M. et al.,

Defendants and Appellants.

D053178

(Super. Ct. No. NJ13070A-B)

APPEALS from orders of the Superior Court of San Diego County, Harry M.
Elias, Judge. Affirmed in part, dismissed in part.

Josefina M. and Martin M., parents of Tony R. and Cristian R. (minors), appeal
the juvenile court's orders denying their Welfare and Institutions Code section 388¹
petitions for modification.

¹ All statutory references are to the Welfare and Institutions Code.

The parents also assert the court's findings concerning the minors' adoptability and the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i) are not reviewable on appeal because the court continued the section 366.26 selection and implementation hearing under section 366.26, subdivision (c)(3). In the event that this court determines that the issues are reviewable, the parents argue that the court did not have sufficient evidence to support its findings.

We affirm the orders denying the parents' section 388 modification petitions. With respect to the court's findings pertaining to adoptability and the beneficial parent-child relationship exception, we conclude that these findings are premature and are not yet ripe for review. Accordingly, we dismiss the parents' claims relating to these findings.²

FACTUAL AND PROCEDURAL BACKGROUND

In March 2005 four-year-old Tony and three-year-old Cristian became dependents of the juvenile court under section 300, subdivision (b) and were removed from parental custody, based on findings Josefina struggled with alcohol abuse and that she had driven

² Martin filed a motion to augment the record to include an interim review report and a psychological evaluation. Martin argues these reports contain new evidence relating to his section 388 modification petition and the minors' adoptability. We deny the motion. Appellate courts rarely accept postjudgment evidence or evidence that is developed after the challenged ruling is made. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405, 413-414.) This is so in part because an appellate court is to review the record that was before the trial court at the time it made its ruling. (*Id.* at p. 405.) Because the additional reports were not before the juvenile court at the time of the proceedings in question nor part of the juvenile court case file, it is inappropriate to augment the record with them. (See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703-704.)

while under the influence of alcohol with the minors in the car. The social worker reported that Josefina lacked the ability to provide adequate care and supervision for the minors and recommended the minors be placed in foster care until Josefina showed progress with reunification services, including parenting classes and Alcoholics Anonymous (AA) meetings.

The social worker reported that during the six months following the minors' removal, the minors had been difficult to place because they exhibited significant sexual acting out behaviors that precluded placing them in homes where other foster children were living. The minors also exhibited some developmental delays. In addition, the social worker indicated that neither Josefina nor Martin had made significant progress with their reunification services. Josefina initially participated in a substance abuse program, but did not complete it, and she discontinued her individual therapy sessions. Josefina's contact with the social worker was sporadic, and she failed to provide the social worker with her contact information. At a six-month review hearing, the court received the social worker's reports in evidence and ordered that the parents participate in an additional six months of services.

In a 12-month review report, the social worker recommended terminating both parents' reunification services. Martin had been deported in December 2005. He did not maintain contact with the social worker following his deportation. Once he returned to the United States in March 2006, he did not participate in reunification services. Approximately one month later, he was again deported. Josefina had been unable to maintain her sobriety during this reporting period. She lived in a substance abuse

recovery home and attempted to participate in services for a brief period but was unsuccessful. The minors remained placed in a licensed foster home and social workers attempted to schedule family visitation when the parents could be located. When visits took place, the minors appeared happy to see Martin and Josefina. At the 12-month review hearing, the court terminated both parents' reunification services.

In May 2007 Martin filed a section 388 modification petition. He later withdrew his petition. Josefina submitted a separate section 388 petition, and the San Diego County Health and Human Services Agency (Agency) submitted. Following a hearing on the petition, the court authorized reunification services for both parents and instructed the Agency to transition the minors into Josefina's care and custody. In August 2007 the Agency placed the minors with Josefina. She had secured housing and stable employment. Martin regularly visited the children and sometimes looked after the minors when Josefina went to work.

In December 2007 the Agency filed a section 387 petition on behalf of the minors, seeking to remove them from Josefina's care. The Agency had received a referral that stated that an outreach worker had found Josefina drunk on the floor in her home. Martin was also found drunk and passed out on the floor in Josefina's home. Josefina said she would stop drinking, but a few days later, she arrived at her recovery program under the influence of alcohol and refused to remain in the program. The police arrested Josefina and released her the following day. After the parents' relapses, the social worker attempted to contact them by telephone and by visiting them at their home, but was

unsuccessful. The court granted the Agency's section 387 petition, removed the minors from Josefina's custody, and placed them in a foster home.

The social worker recommended terminating services and scheduling a selection and implementation hearing under section 366.26. The parents had received more than 18 months of services. Josefina had regained custody of the minors, but had been unable to maintain sobriety, and did not seek the support of her treatment program when she needed help. Martin had not completed parenting classes, and never enrolled in a substance abuse program. The court held a jurisdiction and disposition hearing, terminated reunification services, and scheduled a section 366.26 hearing.

In an assessment report, Social Worker Sandra Rubio assessed the minors as adoptable. The boys were considered generally adoptable based on their good health, general attractiveness, and absence of significant developmental delays. The foster mother reported the children were doing well. They had lived with her for 10 months. Both boys went to school, but Tony had not yet learned to read or write, and Cristian also suffered from learning delays. The current caregiver wanted to adopt both boys and was in the early stages of the home study process. Tony wanted to remain with his caregiver if he could not return to live with Josefina. Cristian did not want to live with the caregiver, and instead wanted to live with his cousin. In the event the caregiver could not adopt the minors, the Agency reported that there were five homes in San Diego and 103 homes outside of the county that were willing to take a sibling set with similar characteristics.

Ms. Rubio acknowledged that the minors shared a relationship with Josefina but believed that the relationship was not parental in nature. The minors enjoyed spending time with Josefina and Martin and interacted well with the parents during supervised visits. However, the minors did not show signs of distress after the visits ended. Ms. Rubio reported the boys were in need of permanence and stability after having spent more than 18 months as dependents. In Ms. Rubio's opinion, the benefits of adoption outweighed the relationship the minors shared with their parents.

In April 2008, Josefina filed a petition for modification under section 388 seeking to have the court place the minors in her care and to order family maintenance services. Alternatively, she requested the court order a permanent plan of guardianship or another planned permanent living arrangement (APPLA). As changed circumstances, she alleged that she had participated in services and had been testing clean. In addition, she claimed that she had established a secure home for the minors. With respect to the minors' best interests, Josefina alleged that she and the minors shared a strong bond.

Martin also filed a section 388 modification petition seeking to have the minors returned to his custody, with family maintenance services. Martin alleged as changed circumstances that he had completed a parenting class, participated in 12-step meetings, participated in substance abuse treatments, and was testing clean. As to the minors' best interests, Martin alleged that he and the minors shared a strong bond.

In May 2008, the court held an evidentiary hearing to address the section 388 petitions. The court considered Ms. Rubio's addendum report, in which she indicated that the minors did not share a strong bond with their parents or look to the parents to meet

their daily needs. The minors' caregiver reported the children did not ask to see their parents or to speak with them on the telephone in between visits. Further, the minors did not show signs of distress after ending visits with their parents. Ms. Rubio further noted that the parents had not made progress with services. Josefina had not completed her substance abuse program and Martin had been in drug and alcohol treatment for less time than Josefina had.

Josefina admitted that she relapsed after the minors had been placed with her. She did not have a sponsor and she was not in a treatment program at the time of her relapse. Josefina stated that she did not know whether she would ever abuse alcohol again, but said that she would talk to her support group to keep herself from drinking. Martin testified that he did not believe he had a strong drinking problem, but admitted that he had relapsed. He said that he hoped to stay clean and sober, and indicated that he had completed a parenting class.

After considering the testimony of the parents and the Agency's reports, the court denied the parents' section 388 petitions. The court found the minors to be adoptable and also found that the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude the termination of parental rights. The court delayed terminating parental rights under section 366.26, subdivision (c)(3) and continued the hearing for 90 days in order to provide sufficient time for completion of the caregivers' home study. Martin and Josefina filed timely notices of appeal.

DISCUSSION

I

The Court Did Not Abuse its Discretion by Denying the Section 388 Petitions

The parents claim that the court erred by denying their section 388 modification petitions. Both Josefina and Martin assert that their circumstances had changed, and that the proposed modifications were in the minors' best interests because the minors were bonded to them.

Under section 388, a party may petition the court to change or set aside any previous order of the court in the juvenile dependency action. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) The petitioning party has the burden of showing, by a preponderance of the evidence, either a change in circumstances or new evidence, and that the proposed modification is in the child's best interests. (§ 388; *Jasmon O.*, *supra*, at pp. 415-416.) Whether a previous order should be modified and whether the proposed modification would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

We review the grant or denial of a petition for modification under section 388 for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) While the abuse of discretion standard gives the trial court substantial latitude, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action' Action that transgresses the confines of the applicable principles of law is outside the

scope of discretion and we call such action an 'abuse' of discretion. [Citations.]" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

When the court evaluates the appropriate placement for a child after reunification services have been terminated, its sole task is to determine the child's best interests. (*In re Stephanie M., supra*, 7 Cal.4th at p. 320.) In this context, the goal is to assure the child "stability and continuity." (*Id.* at p. 317.) The need for stability and continuity "will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child." [Citation.]" (*Ibid.*) Thus, after the court terminates reunification services, "there is a rebuttable presumption that continued foster care is in the best interests of the child." (*Ibid.*)

A. The Parents Did Not Establish Changed Circumstances or that the Requested Modifications Would be in the Minors' Best Interests

In support of her petition, Josefina asserted that circumstances had changed because she had participated in services to maintain her sobriety, she had not tested positive for alcohol, and she had a stable residence. Admittedly, Josefina has been testing clean at the time she filed her section 388 petition. However, Josefina has an ongoing problem with alcohol addiction. After 18 months of services, Josefina regained custody of the minors, but only about three months later, Josefina stopped attending her treatment program, and one month later, she was found drunk on the floor of her home. The minors were present in the home at the time of her relapse. Josefina eventually resumed treatment, but at the time of the hearing on her section 388 petition, she had not completed her treatment program. Although we acknowledge her current sobriety,

Josefina testified she did not know whether she would ever drink again. At best, the evidence and Josefina's testimony show her circumstances were "changing," but they had not changed sufficiently to warrant returning the minors to her custody. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 48.) A petition that alleges merely changing circumstances does not promote stability for the child or the child's best interests because it would mean delaying the selection of a permanent home to see whether a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point. (*Id.* at p. 47.)

Martin's circumstances similarly had not changed. He argued he completed a parenting course, participated in substance abuse services, and remained sober. However, Martin had yet to dedicate significant time to his recovery. At the time of Josefina's relapse, he had been drinking with Josefina and was found passed out on the floor. Martin had been attending AA meetings at the time, but was not participating in a treatment program. Martin later enrolled in a treatment program, approximately four months before the section 388 hearing and had not tested positive for drugs or alcohol. However, he did not have a 12-step sponsor and his program did not include counseling services. He testified that although he suffered a relapse, he did not believe he had a strong problem with alcohol. His unwillingness or inability to acknowledge that he has a serious drinking problem, and the fact he has not completed services after more than 18 months, does not show that his circumstances had changed sufficiently to allow the minors to be returned to his custody.

Even if Josefina and Martin had shown changed circumstances, they did not establish that returning the minors to their custody with further reunification services would be in the minors' best interests. After termination of reunification services, the focus of dependency proceedings is to provide the child with permanency and stability. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254-56; *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) At the time of the hearing on the section 388 petition, the minors had been in and out of Josefina's custody for about three years. Josefina reunified with the minors after 18 months of services only to have them removed again about four months later. Josefina and Martin participated in treatment programs and 12-step programs but they had been unable to complete the programs or overcome their drinking problems. The social worker observed visits between the minors and the parents, and noted Josefina and Martin were more like friends to the children than parents. Their relationships did not outweigh the minors' need for stability and security. It would not be in the minors' best interests to postpone implementing a permanent plan and to allow the pattern of reunification and removal to continue. The court acted within its discretion by denying Josefina's and Martin's section 388 modification petitions.

II

The Parents' Challenges to Adoptability and the Beneficial Parent-Child Relationship Exception are not Ripe for Review

Martin and Josefina argue that the juvenile court's findings concerning adoptability and the beneficial parent-child relationship exception were "interim findings," and are thus not appealable until after the court terminates parental rights. The Agency agrees

that raising contentions in the present appeal concerning the court's findings are premature.

At an initial section 366.26 hearing, the juvenile court made findings concerning the minors' adoptability and found that the beneficial parent-child relationship exception does not apply. However, the court did not terminate parental rights at that time. Instead, the court delayed termination under section 366.26, subdivision (c)(3) in order to provide additional time for the completion of the caregivers' home study. The court advised the parties to begin the appeal process even though it had not terminated parental rights.

Section 366.26, subdivision (c)(3) provides that a trial court may "identify adoption as the permanent placement goal and [without terminating parental rights,] order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days." Here, the home study of the foster parents' home had yet to be completed at the time of the section 366.26 hearing. The court took advantage of section 366.26, subdivision (c)(3) to set another permanency hearing in 90 days, at which time it would determine whether to terminate parental rights. The outcome at that hearing may be dependent on whether the home study is approved and an adoptive family is secured for the minors. The court will make its final determination concerning parental rights at that time. Until the final determination is made, the parents' contentions concerning the court's findings pertaining to adoptability and to the beneficial relationship exception are

not ripe for review.³ (See *In re Y.R.* (2007) 152 Cal.App.4th 99, 108-109; *In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1019.)

DISPOSITION

The motion to augment is denied. The court's orders denying Josefina's and Martin's section 388 petitions are affirmed. Appellants' challenges to the courts' findings concerning adoptability and the beneficial parent-child relationship are dismissed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.

³ Because the issues are not ripe for review, the parents are not foreclosed from raising challenges to the court's findings should parental rights be terminated at a later hearing.